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Supreme Court, U.S.
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In the

Supreme Court of United States

Robert Wilson,

Petitioner

vs.

John Dalton, Secretary of the Navy

Respondent

On petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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80 pp

QUESTIONS PRESENTED

Did the Ninth Circuit's refusal to overturn the previous decision in Wilson v Dalton, Secretary of Navy which demonstrates that the Navy committed perjury and the U.S. Attorney suborned perjury during trial warrant this court to conduct an independent investigation?

Does the Ninth Circuit's refusal to overturn it's decision in Wilson v Drake in spite of evidence that the Navy committed perjury in obtaining U.S. Attorney representation, and the Ninth circuit's decision was in conflict with congressional intent regarding FTCA and FELRTCA warrant reversal?

Did the Ninth Circuit Panel abuse its discretion when it denied Petitioner's request for Judicial Notice on evidence demonstrating perjury by the Navy and suborned perjury by the U.S. Attorney, especially since the entire Ninth Circuit Panel could have seen the perjury for themselves?

Did the Ninth Circuit abuse its discretion when it failed to reverse the District Court's grant of the Navy's motion for summary judgment, when the District Court impermissably made numerous findings of fact, which were either disputed or not framed by the Navy's motion, thereby denying Petitioner his constitutional, Seventh Amendment right to a jury trial on the facts?

Did the Ninth Circuit abuse its discretion when it refused petitioner's petition for rehearing with evidence demonstrating an agreement to strike the word"severe" from his complaint, especially since the Ninth circuit's opinion was based on lack of such evidence?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit in Wilson v. Drake is reported at 87 F3d 7813 (1996).

The Opinion in Wilson v. John Dalton, Secretary of Navy is found in the appendix, below. ("App").

The order denying the petition for rehearing with suggestion for rehearing en banc is also included in the appendix.

The memoranda opinions of the United States District Court for Central California (Audrey B. Collins,J.) are reprinted in the appendix.

JURISDICTION

By order dated 26 April 20002, the panel voted to deny the petition for rehearing and rehearing en banc based upon the recommendation of Judge Fletcher.

The jurisdiction of the Supreme Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1)

STATUTES INVOLVED

The statutes principally involved in this case are:

1) 28 U.S.C. 1346, Federal Tort Claims Act
2) 28 U.S.C. 2679 Federal Employee Liability Reform Tort Claims Act
3) 18 U.S.C. Subornation of perjury:
4) 29 U.S.C. 701 Rehabilitation Act

STATEMENT OF THE CASE

Petitioner has provided a lodging of the exhibits referenced in this petition with this Court. Although the clerk's office discourages this practice, it stated the practice is permissable. The reason for providing the lodging of the exhibits is to provide the Court with the actual evidence of the serious allegations raised, namely perjury and suborning perjury.

Petitioner began working for Respondent's military facility at Point Mugu, California, in April 1988 as an Electronic Engineer. His duties primarily involved performing design and analysis of weapon systems and preparing reports of his findings. Almost all of his work was done on a computer.

Shortly therafter, he was diagnosed with two herniated discs in his lower back. His physical therapist, Larry Watts, recommended a series of back exercises as well as an ergonomic chair for his office. His supervisor at that time, Guy Cooper, provided an ergonomic chair and allowed time off for the back exercises. Petitioner was also diagnosed with ankle maladies by another physician, who recommended orthotic appliances. Petitioner never filed a workman's compensation claim for either injury.

To the extent that this Court believes that Toyota v Williams,122 S.Ct. 681 (20002) ("Toyota") makes this case moot, this case is completely distinguishable because unlike Toyota, the Court determined that Respondent's medical restrictions (repetitive work with hands and arms extended at or above shoulder levels for extended periods of time) "is not an important part of most peoples daily lives." Toyota at 693.

Petitioner's carpal tunnel syndrome (characterized as "severe" according to several medical reports) restricted and prevented petitioner from engaging in a major life activity that a significant number of people engage in (See NIOSH Repetitive Motions) namely computor typing and handwriting.

The Court in Toyota withheld the arguement "that working could be considered a major life activity", concluded"we need not decide this difficult question today." Toyota at 692.

This case compels the arguement that repetitive motions associated with working is a major life activity, because, as shown in the NIOSH Table a significant number of people in a wide range of occupations are affected by repetitive motions.

By granting this petition, this court could clarify the boundaries between work, major life activities,

Moreover, petitioner's injury is not limited to carpal tunnel syndrome. As noted in Dr. Roback's report (in which he evaluated petitioner's condition after the Navy failed to provide the accommodations requested by petitioner's previous physicians), Dr. Roback noted "Because of the patients foot abnormalities, he is unable to do any work which requires ambulation. This is further intensified because of his back which limits such activities as bending, twisting, overhead work, lifting, carrying, pushing and pulling. The patient is unable to do any gainful employment in a sitting position because prolonged sitting does bother his back. Furthermore, most jobs in a sitting capacity require extensive use of the upper extremities for things such as computor input, typing or writing. Because of the nature of his back injury (herniated disc), wrist and

hand condition (carpal tunnel syndrome), and the inflammatory condition of his feet (as demonstrated on the bone scan). He probably will require carpal tunnel release of both hands (particularly if he attempts to do any extensive writing, filing,computor input..).It is also likely that the patient will require surgery for his lumbar disc and associated spinal stenosis"

Finally, as noted in Toyota, "household chores" are considered of central importance to most peoples daily lives. Toyota at 683. As noted in petitioner's deposition, petitioner's meal preparation (post injury) consists of foods that don't require "a great deal of preparation", such as fresh fruits/vegetables, microwave (meals), and "eating out". Since petitioner lives on a boat, he mostly pays people to clean/work on it, instead of doing the work himself. Petitioner also pays people to work on his car(s).

In August 1991, Petitioner was diagnosed with bilateral carpal tunnel syndrome, which means that the condition affects both wrists and hands, by his treating physician, Dr. Desiree Domingo Foraste, General Practitioner, who prescribed several weeks time off from work as well as physical therapy for his hands. She also requested his employer provide another ergonomic chair for petitioner's back since the original chair was ineffective in assisting petitioner's back injury. (See Lodging Exh.12) His new physical therapist,Bobbie Johnson, asked petitioner a series of questions regarding his work office area structure, provided publications issued by the Occupational Safety annd Health Administration (OSHA), and suggested petitioner file a claim for workman's compensation. Weeks later, Dr. Foraste allowed petitioner to return to work, with restrictions and requests for accommodation,

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including specific dimensions for the ergonomic chair, no
computor typing or reproduced motion, handwriting only short notes, and an adjustable work surface unit.

In February 1992, Petitioner transferred his care to hand specialist, Dr. Dennis Phelps, who also diagnosed bilateral carpal tunnel syndrome. In March 1992, Dr. Phelps work restrictions "precluded (Petitioner) from keypunching, (computor) typing , data entering, etc.".Dr. Phelps concluded, "I recommend that he be permitted to dictate rather than write whenever possible".(Lodging Ex 13) In May 1992, Dr. Phelps recommended a deskomatic device for petitioner. (Lodging Ex 14)

In September 1992, Navy physician, Dr. Stoerman evaluated petitioner as having a "severe case of carpal tunnel syndrome" and sternly warned the Navy "if Dr. Phelps recommendations are not followed Mr. Wilson (Petitioner) could have permanent severe nerve damage". (Lodging Ex 15)
*This fact was ignored by the trial court, even though fact and evidence provided in Oppostion to Motion for Summary Judgment. (OMSJ) (See lodging Ex)

In January 1993, Dr. Phelps evaluated Petitioner at Respondent's request. Dr. Phelps noted Petitioner's condition as "worse".* The nerve conduction studies requested by Dr. Phelps documented petitioner as having "severe temporal dispersion" in his hands.* Dr. Phelps "strongly recommended" an ergonomic evaluation of petitioners work area by Pete Johnson, an ergonomist associated with National Institute for Occupational
Safety and Health (NIOSH).(Lodging Ex 16)
*This portion of fact was ignored by the trial court, even though fact and evidence provided in OSMJ

In March 1994, Dr. Blacker, Petitioner's new treating physician, evaluated Petitioner, diagnosed bi-lateral carpal tunnel syndrome, and placed initial work restrictions of no flexion or twisting of both wrists and fingers. He later modified the restrictions to include some computor typing, but added, "I think he will have recurrent pain at his present level and he might have some increase in his symptoms."*
(Lodging Ex17,18)
*This portion of fact was ignored by the trial court, even though fact and evidence provided in OSMJ

In July 1994, Dr. Blacker modified his work restrictions to state, "I think he should avoid very repetitive work. I think it is advantageous for him to have been provided with dictating equipment in order to allleviate the repetitious motions associated with writing."*
(Lodging Ex 19)
*This portion of fact was ignored by the trial court, even though fact and evidence provided in OSMJ

Although the Navy complied with Dr. Blacker's restriction to avoid very repetitive motions associated with computor typing by providing petitioner with a voice control computor, the Navy denied petitioner's request, as well as the Navy's Problem solving Team recommendation to "transfer (petitioner) Wilson to another Supervisor or activity." (Lodging Ex 20)

In addition, the Navy's supervisor, Wil Bertelt, declined to
provide computor software to allow petitioner to create computor program flowcharts on the voice control computor,** declined to provide an upgraded version to petitioner's voice control software,** and provided petitioner with a computor printer that the supervisor

admitted "It started acting up. I am not sure what is wrong."**(Lodging Ex 21,22,23)
**These facts and evidence were omitted by trial court in response to Respondent's Motion in Limine to Exclude Evidence.(RMLEE)

Wil Bertelt previously offered petitioner a deskomatic device that was "broken, but that it "may be able to be repaired".*(Lodging Ex 24)
*This portion of fact was ignored by the trial court, even though fact and evidence provided in OSMJ

In rating petitioners final task rating, Wil Bertelt concluded that petitioner deserved a less than fully successful rating because he failed to provide a system program description, which Wil concluded was 30% of the task, even though the evidence showed that petitioner did provide the system program description to Wil Bertelt. Steve Stanfeld, the engineer who designed petitioner's final task and gave petitioner a fully successful performance rating, concluded that the system program description was not 30% of the task and in fact, "trivial".(Lodging Ex 25)
**These facts and evidence were omitted by trial court in response to Respondent's Motion in Limine to Exclude Evidence.(RMLEE)

In March 1995, Dr. Blacker evaluated Petitioners hands at the request of the Navy and U.S. Dept of Labor and determined his permanent and stationary level of injury at that time to be 25% loss of strength in both arms. Dr. Blacker also opined that Petitioner was no longer able to work in his usual and customary capacity and requested a job analysis prior to releasing him back to work for the Navy and vocational rehabilitation. (Lodging Ex 26)
*This portion of fact was ignored by the trial court, even though fact and evidence provided in OSMJ

The Navy declined to provide a job analysis to Dr. Blacker and in April 1995, the Navy terminated Petitioner for poor performance.(Lodging Ex 27)

In March 1996, Dr. Micheal Roback evaluated Petitioner and determined 100% medical disability citing "inability to sit for long periods of time due to back injury, restrictions on computor typing, extensive filing, and limited handwriting. When asked by the Social Security Administration to clarify work restrictions for any computor typing, filing, or handwriting, Dr. Roback responded, no repetitive motions, no sitting in any continous position, lifting restrictions less than ten pounds, no sitting in a nonergonomic environment." (Lodging Ex 28)

BEFORE THE TRIAL, in an unusual move, Judge Audrey Collins made numerous "findings of fact" regarding Respondent's Motion for Partial Summary Judgment. Judge Collins concluded that the Navy provided reasonable accommodations by concluding an employer isn't required to provide the latest and "greatest" and she "found that the Navy tried other things out" in an effort to provide reasonable accommodations. Judge Collins specifically precluded alot of evidence from being heard at the trial regarding the perjury committed by the Navy after hearing respondents Motion in Limine to preclude evidence based on her previous findings in the Summary Judgment. Regarding petitioner's claim (along with supporting evidence) that the Navy unjustly terminated petitioner for failing to provide a system program description, Judge Collins precluded this fact and evidence because it was "stray, nonactionable comment".(App. Ex. 2,3)

The trial court granted Defendant's request for a mental examination, even though petitioner agreed to strike

"severe" from his complaint, so that his complaint would read "emotional distress" instead of "severe emotional distress".

The psychiatrist's written examination revealed that the psychiatrist based his clinical "findings" that Petitioner was schizotypo-paranoid because of his "perceptions of wrongdoing in the work-environment", which the psychiatrist stated at least 10 times in his report. The psychiatrist's report relied on Judge Audrey Collin's Order regarding defendant's motion for Summary Judgment as the basis for his findings because he stated, "Judge Collin's order is thorough, ample, logical, persuasive, and it spares me the task of analyzing the same data" regarding petitioner's claim that the Navy did not provide "reasonable accommodations". (Lodging Ex 29)

DURING THE TRIAL, Exhibit 10 demonstrates, when petitioner was on the witness stand being asked to describe physically what occurred at work regarding his accomodations the Trial Court interjected, "And let me just tell the jury. The Court has already ruled that he was reasonably accomodated by his employer"..."but this Court has already ruled, and you will be instructed that the Department of the Navy reasonably accommodated him, meaning, as you'll find out from the trial, that they reasonably responded to his requests for reasonable accomodation."... The Court ordered that petitioner's response "that he felt he wasn't reasonably accomodated" was to be "stricken"

Exhibit 11 demonstrates when Petitioner's attorney began cross-examining Petitioner's former supervisor regarding the secretary's failure to take dictation, the trial court interrupted, **without an objection from the defendants,** "I'm going to sustain an objection. This goes to reasonable accomodation, and the court has already ruled on that"

Exhibit 12 demonstrates when petitioner's attorney began cross-examining Mary Wedel, Navy employee regarding Dr. Foraste's request for a 27 inch desk, the trial court interrupted, "Counsel, at this point I'm going to interpose an objection,... This is all going to reasonable accomodation..."

On appeal, petitioner cited summary judgment case law and many examples of where Judge Collins made numerous "findings" in her order regarding respondent's motion for partial summary judgment. Petitioner also filed a motion for sanctions citing numerous incidents and evidence demonstrating perjury by Navy employees, which the Ninth circuit denied.(Lodging Ex 5)

The most outrageous portion(s) of the trial court's opinion is where she stated facts that were inapposite of the evidence.
This occurred several times. Most notably is the trial court's statement that "Dr. Roback" fails to provide a factual bases for the medical opinion and fails to provide his medical background"
As shown, (Lodging Ex 6) Dr. Roback's medical background was provided and he did set forth the bases for his medical opinion. App. Ex 2 p. 13
Additionally, the trial court stated, ""the OSH conducted a second ergonomic survey and videotaped it. After the second ergonomic survey, Johhnson recommended the following work station adjustment: 1) an ergonomic chair without arms; a wrist pad; and 3) a copyholder" App. Ex. 2 p. 3
As noted, Johnson stated in her letter, "After reviewing the video I would still recommend the following, (same list originally recommended) (Lodging Ex 7)

REASONS FOR GRANTING THE WRIT

Petitioner raised the following issues in a petition for rehearing with the Ninth circuit. On occasion, the Ninth circuit has granted other petitions in which the parties cited a published case that was incorrect as a matter of law, in order to correct the published case. See *United States v. Aguon* 851 F2d 1158 (9th Cir. 1988)and *Williams-Scaife vs. Dept of Defense Dependent Schools*, 925 F2d 346,347 (9th Cir. 1991). In other U S Supreme Court cases (*Helvering v Hallock*, 309 US 106, *Kilbourn v Thompson* 103 US 168, *Barden v Northern P.R Co.* 154 US 288) Stare Decises mandates that when a case is erroneous as a matter of law, the case should be overturned.

I. **The Ninth Circuit refused to address an important federal question raised in Wilson v. Drake that is in conflict with the U. S. Supreme Court, other courts, other 9th circuit relevent cases,and congress**

For Federal Tort Claims Act [FTCA] Claims, in *Williams v. United States* 350 U.S. 857, this court decided *per curiam*, "This case is controlled by California doctrine of respondent superior."

For Federal Employee Liability Reform Tort Claim Act [FELRTCA] claims, "In determining whether acts of a Federal Employee subject to a Federal Tort Claim are within scope of his employment, court is bound to apply state law." *Wilkinson v. Gray* 523 FSupp377, cert denied 103 S. Ct. 209;*Henderson v. U.S.* 429 F2d 588;*Rallis v. She* 821 F Supp 466;*Nadler v. Mann* 951 F2d 301;*Woods v. McGuire* 954 F2d 388

See also *Pelletier v. Home Federal Savings Bank*, 968 F2d 865 (9th Cir. 1992) @ 876, in which the Ninth

circuit held, "the question whether a federal employee who's allegedly tortious conduct is the subject of a lawsuit...is to be answered according to the principles of respondent superior.".

In H.R. Report 700, 100th Congress "The legislative history of the FELRTCA clearly establishes that Congress intended the principles of respondent superior to govern FTCA claims to control decisions regarding entitlement to substitution *Pelletier* 968 F2d at 876

However, in *Wilson v. Drake*, 87 F3d 7813 (9th Cir. 1996), the Ninth Circuit held, "Application of state-law policy considerations would nullify federal statutes that grant immunity to federal employees so that they can perform their functions without the threat of tort actions."

2. **The Ninth Circuit refused to correct their erroneous conclusion of law regarding contradictory material facts.**

At page 7821 of *Wilson v. Drake*, the 9th Circuit concluded, "In fact both of the alleged incidents took place when Drake in his capacity as Wilson's supervisor, was trying to obtain information from Wilson concerning Wilson's work related disability."

Wilson's declaration stated, "Drake came to the door of my office at the base, to request information as to a recommendation which had been given by one of my doctors to accomodate my handicap. I responded that I had supplied through the doctor and other wise, everything necessary to support such request for a reasonable accomodation."..."later in the day, about 2; 00 p.m., Drake began approaching my office inquiring as to whether I had provided him some typewritten material, which he asserted was due the previous

Friday. I exhibited the tape recorder upon Drake's entry into my office as I believed he wanted to have conversation concerning my request for reasonable accommodation..." (Lodging Ex 30)

Drake's declaration stated, "There was another issue that needed to be resolved, that of a form that the human resources office needed. The purpose of the form was to let human resources know his doctor's views on what restrictions exist as to Mr. Wilson's ability to work." and "after Mr. Wilson had returned from the restroom, I returned to his office to talk about the form."(Lodging 31)

The determination whether an employee has acted within scope of employment presents a question of fact, it becomes a question of law, when, "the facts are undisputed and no conflicting inferences are possible."Mary M v. City of Los Angeles 814 P2d 1341.

Clearly there was a disputed material fact as to whether work restriction information had been provided, yet the Ninth Circuit sided with Drake's version depriving Wilson of a jury trial on the factual dispute.

The Ninth Circuit refused to correct Wilson v. Drake in light of the fraud committed by the Navy in Wilson v. Drake when the Navy obtained Dept of Justice representation.

The United States Supreme Court held in *Chambers v. NASCO, Inc.*111 S.Ct. 2123, 2124 (1991), "a federal court has the power to vacate its own judgment upon proof that fraud has been perpetrated upon the court" and that a "federal court has the power to conduct an independent investigation in order to determine whether it has been a victim of fraud." *Chambers* 111 S. Ct. at 2124.

In the Navy's letter to the U.S. Attorney's office, (Lodging Ex 40) the Navy provided misleading facts (portraying petitioner as "ergonomic changes were made to his workstation..these efforts did not satisfy Mr. Wilson" and "Mr. Wilson became increasingly agitated, confrontational, and contentious in dealings with his supervisors over his work assignments")so that Sam Drake could obtain Department of Justice representation regarding the assault and battery incident.

Mary Wedel's original declaration provided to the U. S. Attorney's office stated, "On several occasions staff or I have submitted documents to Sam Drake, Mr. Wilson's supervisor, requiring that Mr. Drake forward them to Robert Wilson or through Mr. Wilson to Mr. Wilson's doctors. The completion of these forms is necessary in order to comply with the requirements of FECA. It was one of Mr. Drake's duties, as Mr. Wilson's supervisor, to give these forms to Mr. Wilson."(Lodging Ex 41)

In another declaration under penalty of perjury, Mary Wedel stated, "It is my understanding that the complainant has named me as the official responsible for faxing a letter to Dr. Blacker without first notifying him (complainant). I telefaxed Dr. Blacker a letter to request information concerning Mr. Wilson's work restrictions. This is standard practice in accordance with 20 CFR CH.1 Section 10.123. I know of no regulation whcih requires that we notify an employee first."(Lodging Ex 42)

Navy employee, Nick Matusewicz, wrote in his official statement in a letter supporting a request for Dept of Justice representation, described petitioner as having "contentious attitude and uncooperativeness" and "Mr. Drake is without fault in trying to manage a difficult employee". (Lodging 43)

However, in another letter written by Mr. Drake and distributed to Nick Matusewicz, Mr. Drake stated he knew (petitioner) Wilson was "taking his work off base and paying someone to type it. Some of his memos and reports had improved in recent weeks that were beyond his normal offerings."(Lodging Ex 44)

Navy employee Sam Drake noted in his daily log of events
that at 1320 Mary Wedel contacted the doctor's office, the doctor's office acknowledged receiving the work restriction form and told Mary Wedel the "work restrictions were the same." Dr. Phelps work restrictions stated, "I recommend that he be permitted to dictate rather than write whenever possible." In the same daily log Sam Drake later noted that Wilsonn (petitioner) accused Drake of "trying to hit him."
(Lodging Ex 45)

Clearly Mary Wedel knew it was not a requirement for Drake to obtain work restriction information because she cited the law that stated otherwise. Nick Matusewicz knew Sam Drake was not providing Wilson proper accomodations because Sam Drake informed him. Sam Drake contradicted his own declaration when he stated he was attempting to obtain work restriction information because he admitted in his own writing he obtained the "same" work restrictions from Mary Wedel before he noted the assault and battery incident.

2. **The Ninth Circuit refused to overturn Wilson v. Navy, in spite of the perjury commited by the Navy and the trial court's actions that prevented the jury from hearing the perjury. They further refused to sanction the U.S. Attorney for suborning the perjury in spite of the U.S. Supreme Court's ruling in Chamber v. NASCO**

Under oath, Sam Drake informed an EEOC Investigator, "I offered Mr. Wilson the use of my secretary to take his dictation and type up his reports". However, in his memos he wrote, "Told him to get his ass in here and I would take his dictation", "Told him Beverly would not take direct dictation into the computor..he is responsible for his work", and "He again stated he was taking his work off base and paying someone to type it. Some of his memos and reports have improved in recent weeks that were beyond his normal offerings. I had assumed he was having another secretary in the division do his editing and typing." (Lodging Ex 50,51,52,53)

When petitioner's attorney began cross-examining Drake regarding dictation accommodations, the trial court interjected, "this goes to reasonable accommodations and the court has already ruled on that". (Lodging Ex 54)

At trial, Grace Tatum testified,"We had numerous memoranda to see where Mr. Bertelt had offered him suggestions, alternatives, other things other resources that could be available to assist him in improving his performance". However, Wil Bertelt's memorandum stated, "I re-emphasize to you that you are responsible for accomplishing the job using the resources made available to you(no matter how crude, inefficient these resources might be) sometimes you have to be creative and improvise in order to get the job done on schedule." In response to a motion in limine, the trial court excluded the statement, "Wil admitted the resources provided by him were "crude" (Lodging Ex 55,56,57)

Under oath to an EEOC Investigator, Beverly Muchow stated, "I did a lot of transcription of Mr. Wilson's work and also his writing for a long time due to his handicap.

I don't remember the dates, but I have never refused any work that has been given to me". In her memo to Sam Drake, Beverly stated "Then he said, actually I was going to dictate to you and do it on a computer at the same time. And I said no because Sam said it would take so much of my time. Gerry Weeks told me many times not to accept anything from Wilson if he cannot give me in readable writing. " (Lodging Ex 60,61)

Although the trial court did allow Lisa Stuckey to testify that she witnessed Beverly Muchow yelling at Petitioner to "talk to Sam about it and get out of my office" when petitioner asked for dictation assistance, the jury was only able to "hear" the trial court inform them that the Navy provided reasonable accommodations and, on one occasion, the secretary yelled at petitioner. (Lodging Ex 62)

Under oath to the EEOC investigator, Gerry Weeks stated, "I never formulated any opinion regarding his medical condition", however in his own memo, Gerry wrote "What is further exasperatingly is that Mr. Wilson is back on the job under workmen's compensation with restrictions which he keeps quoting to us from his doctors. This situation keeps putting management in a precarious position as having to interpret these pseudo restrictions. At trial Gary Weeks avoided perjury by stating, "I didn't know. I didn't know if they were valid or not. " (Lodging Ex 70,71,72)

During trial Mary Wedel testified, in response to the questions posed by the court, So you're saying you saw it more less as their description of what a good work station would be? "Right. " But at the end of that there wasn't any language saying we request it? "Correct. ". This contradicted the letter written by the physical therapist stating "Appropriation of the above items within a 30 day period would be most beneficial".

At trial when petitioners former attorney continued questioning Mary Wedel regarding the physical therapist recommendations, the trial court interjected, "I've ruled the defendant reasonably accommodated. " (Lodging Ex. 80,81,82)

Before the trial, Wil Bertelt wrote, "Mr. Wilson was not hindered in his test assignment by not having a printer connected to his computor...I located a printer for him at the earliest opportunity so as to allow him to do his own printing.and thus increase everyone's efficiency. " In August 1994, Wil wrote, Until I locate a printer for your system", "In November 1994, Wil wrote, " I am working to locate a printer as I discussed with you...It started to act up. I am not sure what is wrong. Under oath at the MSPB Hearing, in response to the question, "why did you wait three months before you actually found a printer for me that wouldn't even work?", Wil stated, "I --I did not hear or make--hear a request from you for a printer, number one..I took it upon myself to locate that printer, not because you were hounding me for it..". The trial court precluded Facts 109 and 117 from the trial regarding the "broken" printer.(Lodging Ex 91,92,93)

In his opposition to motion for Sanctions, the U.S. Attorney does not deny knowledge of documentation of perjury, because he admits the "documents appear to have been exchanged in the course of discovery". Without explaining how, his only defense is that the documentation is "unauthenticated heresay" and "Wilson failed to raise the issue below [at trial]"(Lodging Ex. 99)

This court ruled in *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991), Courts have inherent power to "punish conduct which abuses the judicial process".

The "inherent powers are "not governed by rule or statute but by the control vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers* 111 S. Ct. at 2123. See18 USC Suborning perjury

3. The Ninth Circuit refused to overturn Wilson v. Navy in spite of the trial court's and 9th circuit's own erroneous finding of facts in violation of Federal Rule of Civil Procedure 56 (c) and this court's holding in Fortner Enterprises Inc.

The trial court made the following "findings"; "find..that the Navy made a good faith effort to [accommodate (petitioner's) needs and requests] 657:14; "find ...that objectively, the accomodations provided show that {the Navy] acted reasonably."ER 657:25n.122;"it is true that Defendant [the Navy] did not comply with all of plaintiff's requests.."ER 657:13-14; Navy"acted reasonably in addressing Plaintiff's complaints" and the Navy"did not unreasonably handle [petitioner's] request for an ergonomic chair."(App. Ex.2)

The 9th Circuit opined, "However, the Navy produced evidence that these incidents were caused by innocent mistakes or decisions that were reasonable under the circumstances, and Wilson offered no contrary evidence."
(App. Ex. 1 p.3);"Wilson does not dispute that the Navy provided some accommodations and has produced no evidence tending to show that the Navy's accommodations were not unreasonable." (App. Ex 1 p.4);"Wilson also cites verbal abuse and humiliation by his supervisors and a compensation claims administrator. The record reveals the incidents in question might be more accurately characterized as interpersonal friction."(App. Ex 1 p.3)

Federal Rules of Civil Procedure 56(c) specifically states, "On a motion for Summary Judgment neither Court of Appeals nor the trial court are permitted to weigh the evidence, pass upon credibility, or speculate as to ultimate findings of fact."

In Fortner Enterprises Inc., v. U.S. Steel, 394 US 495 this court stated, "On a motion for summary judgment, it is not our function to speculate as to ultimate findings of fact."

The Ninth Circuit not only failed to overturn the District Court's "findings" of fact, which were impermissable because the facts were disputed and because they had not been framed by the Navy's motion for summary judgment, the Ninth Circuit repeated the very same errors. In particular, the District Couirt could not find that the Navy had reasonably accommodated petitioner, because good faith was an essential element, and bad faith is not a matter of law but of fact. (Barnett v U.S. Air, Inc., 228 F 3d 1105 (9th Cir.2000) and it is virtually imposssible to determine as a matter of fact, because it is so subjective (Navarette v procunier, 536 F2d 22277). The Ninth Circuit, thus failed to follow a long line of cases, which include Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc.,563 F2d 391(9th Cir. 1977)Warrior Towbigbee Transport Co. v M/V Nan Fung, 695 F2d 1294 (11th Cir. 1983) and Farberwerke Hoeschst A.G. vM/V "Don Hicky," 598 F2d 795(5th Cir. 1979). The rules of summary judgment are not only very clear, they are there to protect a party's fundamental, constitutional right, guaranteed by the Seventh Amendment, for a jury trial of the facts. Both the district court, and the Ninth Circuit, violated fundamental and important law, regardinng the absolute prohhibition of making findings of fact that are disputed or unframed.

6. **The Ninth Circuit refused to accept evidence into record which would have overturned their decision in Wilson v Navy.**

The Ninth based its opinion regarding motions to compel mental examinations on this Court's opinion in Sclagenhauf v Holder, 379 US 104 (1964) which concludes a party must "affirmatively put into issue his own mental or physical condition". The Ninth Circuit's decision in Wilson v Navy stated, Wilson argues that he has not alleged severe emotional distress because he agreed to strike the word 'severe' from his emotional distress claim in his complaint. However, the record contains no stipulation regarding this agreement". On petition for rehearing, petitioner provided evidence demonstrating agreement from the complaint in a request for judicial notice.(Lodging Ex 100) The original three judge panel denied the request for judicial notice. See (Lodging exh 100). Moreover, a panel member circulated a memo that contained inapposite conclusions regarding the
evidence in petitioner's request for rehearing (Lodging 101)

Conclusion

For all the foregoing reasons, Petitioner respectfully requests that this court grant this petition.

Dated: September 29, 20002
LAW OFFICES OF DAVID BURKENROAD

By:
David Burkenroad
Attorney for Petitioner

28 U. S. C. 1346. United States as defendant

(a) the district court shall have a result jurisdiction, concurrent with the United States Court of Federal Claims, of:
(2) any other civil action or claim against the United States, not exceeding $10,000 in amount, founded in either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or and liquidated damages in cases not sounding in tort, except the district court's shall have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or and liquidated damages in cases not sounding in tort address subject to sections 8 (g) (1) and 10 (a) (1) of the contract disputes Act of 1978. For the purpose of this paragraph, and express or implied contract with the Army and Air Force Exchange Service, Navy exchanges, Marine Corps exchanges, coastguard exchanges, or exchange councils of the National Aeronautics and Space Administration show the considered an express or implied contract with of the United States.
(d) the district court's shall have original jurisdiction of any civil action against the United States provided in Section 6226, 6228 (a), 7426, 47428 (in the case of the added States District Court where the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

App. Exh p. 1

28 U.S.C 2679. Exclusiveness of remedy

(b) (1) The remedy against the United States provided by sections 1346 (b) and 2672 of this title for injury or loss of property, or personal injury or death are rising or resulting from the negligent or wrongful act or omission of any employee of the government will acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employees whose act or omission gave rise to the claim or against the estate of such employees. Any other civil action or proceeding for money damages arising and out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred

App Ex. A p. 2

28 USC 2679. Exclusiveness of remedy
(d) (1) upon certification by the attorney general that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, in the civil action or proceeding commenced upon such claim in United States District Court shall be deemed an action against the United States under the provisions of this title and all references thereto, and United States shall be substituted as the party defendant.
(2) upon certification by the attorney general that the defendant employee was acting within the scope of his office or employment at the time of the incident of which the claim arose, any civil action or proceeding commenced upon such claim in state court shall be removed without bond at anytime before trial by the Attorney-General to the District Court of the United States for the District and Division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

App. Ex A p.3

29 USC 701. Findings; purpose, Policy
(a) findings
Congress finds that-
(4) increased employment of individuals with disabilities can be achieved through implementation of statewide workforce investment systems under title 1 of the work force investment act of 1998 (29 U.S. see a 2801 X SEC] that provide meaningful and effective protest the patient for individuals with disabilities in work force investment activities and activities carried out under the vocational rehabilitation program established under title 1, and through the provision of Independent Living Services, support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;

App. Ex A p. 4

Not For Publication Filed December 17, 2001
United States Court of Appeals Cathy A. Catterson
For the Ninth Circuit Clerk, U.S. Court of Appeals

Robert C. Wilson, No. 00-55281
Plaintiff-Appellant D C No. CP-98-2474-ABC
v.
John Dalton, Secretary of
Navy; United States Navy,
Defendants-Appellees.

Appeal from the United States District Court
Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted September 14th, 2001
Pasadena, CA.

,
Before: B Fletcher,TG Nelson, &Berzon,Cir.Judges

Robert C. Wilson (Wilson) sued the Navy under the Rehabilitation Act.1. He appeals the District Court's partial summary judgment for the Navy, arguing that he raised a genuine issue of material fact as to whether the Navy reasonably accommodated his carpal tunnel syndrome. Wilson also appeals the District Court's denial of his motion for a new trial on his retaliation claim, arguing that the district court erred in ordering him to undergo a mental examination. We have jurisdiction pursuant to 28 U.S.C. 1291 and affirm the District Court.

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may provided by Ninth Circuit Rule 36-3

1 29 USC 701-961 (1994 & Supp.IV 1998).

App Ex. 1 p.1

Wilson's likens this case to Barnett v. U.S. Air, Inc.,2 and claims that the Navy did not act in good faith. 3. However, unlike the plaintiff in Barnett, Wilson produced no evidence that the Navy failed to seek a dialogue or communicate with Wilson, otherwise ignored him, or summarily rejected his accommodation requests without offering alternatives. 4. In contrast, the Navy produce evidence that it had met with Wilson, requested information about his conditions and limitations, asked him what he wanted, considered his requests, and offered and discussed alternatives. 5. Wilson contends however, that the Navy did not act in good faith because the Navy failed to provide him with some of the equipment he requested to accommodate his carpal tunnel syndrome, delayed in providing other equipment, and provided unreliable secretarial and transcription support services. However, the Navy produce evidence that these incidents were caused by innocent mistakes or decisions that are reasonable under the circumstances, and Wilson offered no contrary evidence.

2 228 F3d 1105(9thh Cir. 2000),cert. granted, 121 S.Ct. 1600 (2001).Certiorari was granted on a question irrelevant to this case.See 121S.Ct. @1600

3 See Barnett, 228,F3d at 1116(holding that an employer cannot prevail at summary judgment if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process).

4 See id. at 1116-17

5 See id at 1115.

App. Ex. 1 p. 2

Wilson also cites the verbal abuse and humiliation by his supervisors and a compensation claims administrator. The record reveals that the incidence in question might be more accurately characterized as interpersonal friction. In light of Wilson's failure to provide any other evidence of bad faith, these incidents are not enough to raise a genuine issue as to whether the Navy acted in good faith. Wilson also argues that the Navy failed to reasonably accommodate him by refusing to provide him with a specific office equipment he requested. The Rehabilitation Act's mandate to provide reasonable accommodations does not require the Navy to provide Wilson with a specific accommodations he requests, however. 6. Furthermore, Wilson does not dispute that the Navy provided some accommodations and has produced no evidence tending to show that the Navy's accommodations were not reasonable.

Viewing the record in the light most favorable to Wilson,7 he has failed to set forth a specific facts showing that there is a genuine issue for trial regarding the Navy's a good faith or the reason most of the Navy's accommodations of his disability. 8.

6 See id. at 1113 n.4.

7 See McAlindin v. County of San Diego, 192F3d 1226,1232 (9th Cir. 1999),cert.denied, 530US 1243 (2000)

8 See Far Out Productions, Inc. v. Oskar, 247 F.3d 986,997 (9th Cir.2001);Fed R. Civ. P. 56(e)

App Ex. 1 p.3

Wilson's factually unsupported arguments are not sufficient to raise a genuine issue of material fact. 9. We affirm the District Court's partial summary judgment for the Navy.

II.

After a jury verdict for the Navy on his retaliation claim, Wilson moved for a new trial, basing his motion on the district court's refusal to set aside a magistrate judge's order compelling Wilson to undergo a mental examination. We conclude that the district court did not abuse its discretion in denying Wilson's motion. 10.

Wilson expressly alleged "Severe emotional distress and mental anguish" in his complaint. 11.

9 See United States v. Northern Telecom, Inc.,52 F3d 810,815 (9th Cir. 1995)(citing Celotex Corp.v.Catrett,4477 U.S.317,323-24 (1986)

10 See Unocal Corp. v. United States, 222 F3d 528,534 (9th Cir.2000)("we review for abuse of discretion the district court'ss denial of Metrolink's motion for a new trial.")

11 Wilson argues that he has not alleged severe emotional distress because he "agreed" to strike the word "severe" from his emotional distress claim in his complaint. However, the record contains no stipulation regardingg this "agreement,"and the complaint was not amended to strike the word "severe" or reduce the emotional distress damages Wilson sought.

App. Ex. 1 p.4

In depositions, Wilson gave emotional descriptions of all-lasting and significant emotional distress, which, even if not explicit labeled as such, amount to allegations of severe emotional injury. Finally, Wilson sought a substantial amount in emotional distress damages. These considerations provide sufficient grounds per finding that Wilson has placed his mental condition "In controversy" and that there was a "Good cause" for the examination. 12. Thus, the district court did not make a clear error in judgment in upholding the magistrate judge's mental examination order 13. Accordingly, the district court did not abuse its discretion in denying Wilson's' motion for a new trial 14. Affirmed.

12 See Turner v. Imperial Stores, 161 F.R.D. 899,91-98(S.D. Cal. 1995)(collecting cases and identifying the grounds for mental examinations); Ford v.Contra Costa County, 179 F.R.D. 579,579-80(N.D. Cal.1998) (listing grounds for mental examinations);see also Sclagenhauf v. Holder, 379 U.S. 104,116-22(!964);Fed.R.Civ.P.35(a).

13 See Securities and Exchange Comm'n v. Coldicutt, 258 F3d 939,941(9th Ccir. 2001).

14 See Unocal Corp.,222F3d at 534

App. Ex. 1 p. 5

This constitutes Notice of Entry as required by FRCP, Rule 77(d)

Filed June 28,1999
Clerk, U.S. District Court
Central District of California

United States District Court
Central District of California

Robert C. Wilson,
Plaintiff
v.
John v. Dalton,
Secretary of Navy,
Defendants

Case No.CV 98-2474ABC(CTx)
Order re: Defendant Dalton's Motion for Partial Summary Judgment

Defendant John Dalton's motion for partial summary judgment came on regularly for hearing before this court on June 28, 1999. After reviewing the material submitted by the parties, argument of counsel, in the case file, it is hereby ordered defendants motion is granted in part and denied in part.

Defendant John Dalton ("Dalton" or "Defendant") brings this motion for partial summary judgment against plaintiff Robert C. Wilson ("Plaintiff" or "Wilson") asserting that plaintiff cannot present any evidence that he sustained disability discrimination or retaliation in the termination of his employment with the Department of the Navy, the other defendants named in this action. Defended further argues that plaintiff cannot present any evidence warranting reversal of the decision by the Merit Systems Protection Board, which affirmed plaintiff's termination.

I. Actual and Procedural Background

App. Ex 2. p.1

As an electronics engineer for the Navy, Wilson's job primarily involved planning and preparing documents,
schedules, budgets, and reports in support of assigned weapons support equipment in a timely, efficient, and responsive manner. Wilson separate statement of facts ("Wilson sep. stmt. ") 2. Part of plaintiff's job that involved making both oral and technical presentations. Wilson sep. stmt. 3. On or about August ,1991, doctors diagnosed Wilson with carpal tunnel syndrome. Wilson filed a worker's compensation claim with the United States Department of Labor, office of workers compensation programs ("0 W C P") on September 30, 1991, for cumulative soft tissue stress. Wilson sep stmt. 4. Mary Wedel ("Wedel "), of the human resources department at Point Mugu, the military base where plaintiff worked, served as a the administrator for Wilson's compensation claim. Wilson sep. stmt 5.
Wedel received several medical reports related to plaintiff's worker's compensation claim. Wilson sep. stmt. 6. The first medical reports were from plaintiff's physician, Dr. Domingo- Foraste, who diagnosed Wilson with wrist pain and possible posture problems when working on the computer. Wilson sep. stmt. 6.
On September 30th, 1991, the Occupational Safety and Health Office ("OSH) conducted an ergonomic work site evaluation of plaintiff's workstation. Wilson sep. stmt. 8. OSH concluded that plaintiff's chair was inappropriate and that his table was too high given his medical condition. Wilson sep. stmt. 8. OSH's other findings concerned plaintiff's posture while at the computer. Wilson sep. stmt. 8. Wedel sent the OSH evaluation to plaintiff's supervisor, who at that time was Sam Drake ("Drake"). Wilson sep. stmt 9.

App. Ex. 2 p. 2

An ergonomically appropriate chair was ordered at that time. Wilson sep stmt 9. In October 1991, plaintiff provided Wedel a letter from his physical therapist, Bobbie Johnson ("Johnson"). Wilson sep stmt 10. The letter included several recommendations describing what was needed for an ergonomically designed workstation for plaintiff. Wilson sep stmt 10. After receiving the letter, the OSH Office conducted a second ergonomics survey of plaintiff's work area and videotaped it. Wilson sep stmt 11. After the second ergonomic survey, Johnson recommended the following workstation adjustments:1) an adjustable ergonomic chair without arms; 2) a wrist pad; and 3) a copyholder. Wilson sep stmt 11.

On November 4, 1991, Dr. Domingo-Foraste provided a work restriction evaluation stating that Wilson needed to be excused from work from November 4, 1991 until November 18, 1991. Wilson sep stmt 7. The defendants granted this request. Wilson sep stmt 7. On December 2, 1991, Wedel receive a facsimile from Dr. Domingo Foraste, placing plaintiff on temporary total disability until December 16, 1991, for a total of 80 hours. Wilson sep stmt 12. When Wilson returned to work on December 17, 1991, Dr. Domingo Foraste provided additional work restrictions: no computer typing or reproduced motion ; writing to include only short notes; seating at a comfortable level (26 to 27 in. from the ground to the top of the desk); lifting to be kept at a minimum, no more than 2 to 3 pounds at time; and plaintiff's wrist should be kept in a natural position whenever possible. Wilson sep stmt 12. In response, defense agreed to provide plaintiff an ergonomic chair which had already been ordered, relieve plaintiff of typing, provide seating at a comfortable level (26 to 27 in. from the ground to the desk),

App. Ex 2, p 3

lifting to be kept at a minimum, no more than two to three pounds at a time. Wilson sep stmt 13. Additionally, the defendants offered plaintiff a light duty position, based on the restrictions management agreed to follow, not to exceed January 10, 1992. Wilson sep stmt 13. Plaintiff accepted this position, with the proviso that activity caused him pain or discomfort if be immediately stop upon notification of his supervisors.(1)

On January 6, 1992, with the end of plaintiff's light duty approaching, Wedel contacted Dr. Domingo Foraste's office to obtain updated medical information regarding plaintiff's Medical restrictions. Wilson sep stmt 14. Wedel learned that plaintiff had an appointment with Dr. Michael Began ("Began"). Wilson sep stmt 15. Shortly thereafter, Wedel attempted to obtain information from the Doctor Began's office regarding plaintiff's medical restrictions. Wilson sep stmt 16. Defendants extended plaintiff ' s light duty job offer only until February 14, 1992. Wilson sep stmt 17. Plaintiff accepted this offer, with comments. Wilson sep stmt 17. On January 23, 1992, Wedel's Office contacted Timothy Dalstrom OWCP claims examiner, regarding plaintiff's claim. Wilson sep stmt 18. Wedel learned that this time that the 0WCP approved plaintiff's change in treating physicians from Dr. Domingo Foraste to Dr. Dennis Phelps ("Phelps"). Wilson sep stmt 18. On January 27, 1992, defendants extended plaintiff's light duty job offer for additional time until March 31, 1992. Wilson sep stmt 19. Plaintiff declined this offer. Wilson sep stmt 19.

(1) In December 1991, a doctor recommended that Wilson seek psychiatric treatment. Wilson depo. at 90. At least one other doctor also recommended psychiatric intervention. Id at 91-92.

Defendants assert that because the plaintiff declined the light duty offer, which the agency believed was suitable work, pursuant to OWCP Regulations, Wedel informed the 0WCP and requested a denial of plaintiff's workers' compensation benefits. Wilson sep stmt 20. This letter included a list of accommodations defendant had made, including relieving plaintiff of typing requirements, ordering a new ergonomic chair (because the original order placed on October 7, 1991, had been lost)(2); in lieu of a Deskomatic(3),constructing a temporary 3 by 4 ft. copyholder as a temporary measure until a permanent copyholder could be made. Wilson sep stmt 21. Notwithstanding defendants' recommendation 0W CP accepted plaintiff's claim for bilateral carpal tunnel syndrome. Wilson sep stmt 22. On March 27, 1992 Wedel's office received a letter from Dr. Phelps providing further medical restrictions for plaintiff. Specifically, Dr. Phelps opined that plaintiff should not engage in continuous or repetitious activities with either hand, perform data entry, type, or write for more than two to three minutes at a time.

Dr. Phelps also recommended that plaintiff be allowed to dictate his work assignments whenever possible Wilson sep stmt 22.

In response to Dr. Phelps letter, defendants provided plaintiff some transcription support. Wilson sep stmt 23.

(2)Plaintiff received the chair some time shortly after Wedel sent the letter to OWCP. Wilson sep stmt 11.
(3) A deskomatic is a desk of heavy-duty steel construction with fully adjustable height, shallow drawers and a large work surface. Wilson sep stmt 25.

App. Ex. 2 p. 5

In addition, plaintiff and management discussed the possibility of obtaining dictation equipment to assist plaintiff. Wilson sep stmt 24. On May 27, 1992, Wedel will sent a memorandum to Drake indicating that the purchase of a dictating machine should be held in abeyance until Dr. Phelps provided further clarification of his recommendations. Wilson sep stmt 24. Wedel also explored the possibility of providing plaintiff a deskomatic. Considering that Dr. Phelps had stated that the accommodations already provided had been beneficial to the lessening or control of plaintiff's symptoms, that plaintiff's request would necessitate the purchase of another ergonomic chair, and the deskomatic was better suited for a person in the field of drafting or drawing, Wedel denied plaintiff's request. Wilson sep stmt 26. Plaintiff contends, however, that two other non disabled engineers in his office had the deskomatics. Wilson supp decl 42. On July 21, 1992, Wedel's office received a letter from the 0WCP in Washington D.C. requesting that defendants review their deskomatic decision. Wilson sep stmt 26, Wedel decl 25, Exh S. However after sending the issue to the OSH for review and investigation, the OSH concluded plaintiff's work stand was similar to the deskomatic, and ultimately recommended plaintiff's request be denied. Wilson sep stmt 27. On August 27, 1992, defendants updated plaintiff's light duty job offer to cover the period of September 30, 1992. Wilson sep stmt 28. Plaintiff accepted the job, with comments. Wilson sep stmt 28. In an attempt to clarify plaintiff's work restrictions, Wedel forwarded a letter to plaintiff's treating physician, Dr. Phelps. Wilson sep stmt 29. Dr. Phelps ' response on January 28, 1993 included nearly identical work restrictions as he had provided on

March 27, 1992, but also suggested a professional consultation of plaintiff's workspace be conducted. Wilson sep stmt 29. Wedel decided not to use the professional Phelps recommended but contacted Skip Olson, a physical therapist on contract to the Naval Air Systems Command (NAVAIRSYSCOM), who provided detailed ergonomics training to NAVAIRSYSCOM, activities. Wilson sep stmt 30. Olson opined that Wilson's current accommodations were sufficient, but recommended that plaintiff could benefit from a foam lumbar roll and either a shoulder rest, headrest, or speaker phone. Wilson sep stmt 30. Olson also noted that the document holder was too high for marking documents while sitting. Wilson sep stmt 30. On January 18, 1994, plaintiff filed a complaint of discrimination based on his disability and prior EEOC activity. Wilson supp decl 16. In total, plaintiff filed seven complaints between January 1994 and April 1995. Wilson supp decl 16-22. Once again, in February 1994, plaintiff changed his treating physician to Dr. Gerry Blacker ("Blacker").4 Wilson sep stmt 31.

4. On November 8th, 1993, Dr. Phelps and released Wilson from his medical care by letter. See Wilson sep stmt 31. ("We have made every effort to give you call the medical care and to write you with documentation of your condition and the recommendations we have made for management of the carpal tunnel syndrome. I have person spent a substantial amount of time trying to satisfy your requests and demands. My office staff has also spent a great deal of time trying to help you. I can't recall another patient for whom we have made a greater effort to assist in matters of documentation, workstation modification recommendations, etc. [] it appears that our efforts are not satisfactory to you. You wish to obtain a disability retirement from the Department of Labor, and I'm not able to assist you additionally in that effort. There's nothing to be gained by further discussion of that issue, and I could no longer provide treatment for you under the circumstances. ") App. Ex. 2 p17

Wedel subsequently requested updated medical limitations from Dr. Blacker. Wilson sep stmt 31. Blacker responded that plaintiff could perform computer work, typing, and handwriting, provided that the work was not to continuous or repetitive, and plaintiff could take rest breaks. Wilson sep stmt 31.

At about this time, plaintiff began reporting to his new supervisor Wil Bertelt ("Bertelt"), rather than Drake. Wilson sep stmt 32. Bertelt proposed a light duty job description, based on Dr. Blacker's restrictions. Wilson sep stmt 33. Plaintiff indicated that he would respond to the light do the job offer only if and when he was provided with Dr. Blacker's March 23rd, 1994 restriction letter. Wilson's separate statement 33. Although Bertelt has set a deadline of April 1st, 1994, for plaintiff to accept the light duty, plaintiff not except until June 10th, 1994. Wilson sep stmt 34. Based on reports from plaintiff's supervisor, the defendants had been monitoring plaintiff's performance. By February 1994, plaintiff underwent a series of the evaluation reviews known as performance improvement periods. In addition, on April 25th, 1994 plaintiff underwent a physical fitness for duty examination initiated by plaintiff's management. Wilson sep stmt 34. The investigation was conducted by Dr. Patrick Kong ("Kong"), a neurologist. Wilson separate statement 34. Dr. Paul's findings indicated that plaintiff did not have any neurological dysfunction. Wilson sep stmt 34. Plaintiff's treating physician, Dr. Blacker, agreed with several of Dr,'s conclusions. Wilson sep stmt 35.

At the same time that defendants were more closely monitoring plaintiff's performance, they were also continuing to address plaintiff's accommodation requests. App. Ex 2. Pg. 8

As early as October 1993, and certainly by April 1994, defendants provided plaintiff dictation services. See Wilson decl 13; Wedel decl exhibit BB at 113. In August 1994, defendants provided plaintiff voice-activated computer software. Wilson sep stmt 37. Further, in December 1994, defendant supplied defendant with graphic software designed to interface with his voice control computer and the services of a graphics assistant. Wilson decl 16, 18. Notwithstanding these accommodations, defendants found that plaintiff failed to perform to the fully satisfactory level. Wilson sep stmt 38. Accordingly, in April 1995, defendants terminated Wilson based on unsatisfactory job performance for over one year. Wilson sep stmt 38. Plaintiff appealed his termination to the Merit Systems Protection Board ("MSPB"). Wilson sep stmt 38. On July 21, 1997, after an evidentiary hearing, the administrative law judge for the MSPB upheld the termination. Wilson sep stmt 38. Plaintiff then appealed the A L J's decision to the full MSPB board, which affirmed the findings on February 18, 1998. Wilson sep stmt 38. Acting pro se, on April 3, 1998, Wilson filed a complaint against defendants John Dalton, Secretary of the Navy and the Department of the Navy. On May 24, 1999, defendant Dalton filed a motion for partial summary judgment regarding plaintiff's termination claims only. On June 7, 1999, plaintiff, who is now represent by counsel, filed his opposition. Defendant Dalton filed a reply on June 14, 1999.

I I. Discussion

A. Summary judgment standard

It is the burden of the party who moved for

summary judgment to establish that there is "No genuine issue of material fact, and that the moving party is entitled to summary judgment as a matter of law. " Fed. R. Civ. P. 56 (c); British Airways Board verses Boeing Co., 585 F 2 D 946, 951 (9th Circuit 1978), cert denied, 440 U. S. 981 (1979). If the moving party has the burden of proof at trial (plaintiff on claim for relief, or the defendant on affirmativedefense, the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party Calderone vs. United States, 799 F2d 254, 259 (6th Cir 1986) citing W Schwarzer, summary judgment under the federal rules: defining genuine issues of material fact, 99 FRD 465, 487-88 (1984) This means that, if the moving party has the burden of proof at trial a party must establish beyond peradventure all the essential elements of the claim or defense to warrant judgment in that party's favor Fontenot vs' Upjohn Co. 780 F. 2 d 1190, 1194 (5th Cir 1986). Furthermore the court must view the evidence presented to establish these elements "through the prism of a substantive evidentiary burden. " Anderson vs Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). If the opponent has the burden of proof at the trial then the moving party has no burden to negate the opponents claim. Celotex Corp. vs. Catrett, 477 U.S.. 317, 323 (1986). In other words, the moving party does not have the burden to produce any evidence showing the absence of a genuine issue of material fact. Id at 325. "Instead,. . . The burden of the moving party may be discharged by showing--if that is, pointing out to the district court--that there is an absence of evidence to support the non moving party's case. " id. Once the moving party satisfies this additional burden, "An adverse party may not rest upon the

mere allegation to denials of the adverse party's pleadings.. [T]he adverse party's response. .must set forth specific facts showing that there's a genuine issue for trial. " Fed R Civ P 56 (e) (emphasis added). A "Genuine issue" of material fact exist only when the non moving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. Celotex, 477 U.S. at 322-323. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for the plaintiff. " Anderson, 477 U.S. at 252. The evidence of the non movement is to be believed, and all the justifiable inferences are to be drawn in his favor. Id at 248; Griffith vs. Utah Power and Light Co., 226 F. 2d 661, 669 (9th Cir 1955).

B. Reasonable accommodation claim

1. Legal standard for the 501 claim for reasonable accommodation.

Plaintiff brings his claims under 501 of the 1973 Rehabilitation Act, 29 U. S. C. 701-961 or (the "Act"). In 1978, on Congress amended the Act to permit a private right of action for federal employees by enacting the 505 (a) (1), 29 U. S. C. 794 a (a) (1), which provided that the rights and remedies available under title 7 of the Civil Rights Act of 1964, 42 U. S. C. 2000 the-16, were available to a person complaining of discrimination in violation of 501, 29 U. S. C. 791 (West Supp 1998). See Boyd vs. United States Postal Service, 752 F. 2 d 410, 413 (9th circuit. 1985). Under the statute federal employers are required to "make reasonable accommodations where possible, it was

clearly implying that a more active and extensive effort than "nondiscrimination" must be made to eliminate barriers to employment of the handicapped in federal agencies. . Mantolete v Bolger, 767 F2d 1416, 1422 (9th Cir 1985) (internal quotation omitted). To allege a prime facie case of discrimination under the Rehabilitation Act, the plaintiff must show that 1) he was a qualified disabled individual at the time he was terminated, and 2) "That he could perform his duty if reasonable accommodations are made. See Buckingham vs. United States, 998 F. 2 d 735, 739-40 (9th Circuit 1993); Mantolete, 767 F. 2 d at 1423-24. The burden is on plaintiff to show that he is " qualified," meaning that with the without reason accommodation, he/she can perform the essential functions of his job. Mantolete v. Bolger, 767 F2 d 1416, 1423 (9th circuit. 1985). Once a plaintiff has presented a "Facial showing that reasonable accommodation is possible," the burden shifts to the defendant to show that it has reasonably accommodated plaintiff or that such accommodation is not possible. Id. (internal quotation submitted) "quoting Arneson v Heckler 879 F. 2 d 393, 396 (8th cir. 1989)). In determining whether a defendant has satisfied his or her burden, the act expressly permits the disaccord to the "Take into account the reasonableness of the cost of any necessary workplace accommodation" for violations of 5:29 USC 7948 (a) (1); Carter vs. Bennett, 840 F. 2 d 63, 65 (D.C. Circuit 1988).

The parties do not appear to dispute that plaintiff's carpal tunnel syndrome means that he is a disabled person under the act.(5).

5. Although the parties to not raise this issue, the court noted that the most recent medical examination report provided by plaintiff suggests that as of April 25, 1994, nearly a year before his termination, plantiff did not display objective signs

Nor is it disputed that plaintiff is a federal employee. Moreover, neither party contends that plaintiff ' s condition was not amenable to reasonable accommodation while he worked for the Navy. The nature and requirements of plaintiff's job as an electrical engineer were similarly clearly stated and agreed upon. All of plaintiff's doctors and physical therapists stated that plaintiff could work, provided certain accommodations were made. Given these points of agreement, the central issues with the court to determine are 1) whether plaintiff was qualified, with the without accommodation 2) whether defendants reasonably accommodated plaintiff before terminating him.

2. Analysis

a. Questions of fact exist as to whether plaintiff was "Qualified Employee" when he was terminated.

Although significant evidence exist as to plaintiff's inability to perform if his job because of reasons having nothing to do with his disability, the court finds the plaintiff has raised issues of fact which preclude the court from finding that he was unqualified to perform his job, with or without accommodation,at the time he was terminated. As early as November 17th, 1992, plant received notification of unacceptable performance.

5(cont'd) of carpal tunnel syndrome. See supra note 14. Plaintiff submits the Declaration of Michael Roback which states the plaintiff is totally disabled for purposes of disability retirement and Social Security benefits. However, the court sustains defendant's objection to this evidence because it purports to provide expert testimony, but fails to set forth Dr. Roback's expert qualifications. See Fed R of Evid 7 02. In addition, Dr. Roebuck's declaration fails to provide any factual bases for the medical opinion asserted.

See Wilson decl 24 and Exh 4 at 2, attached thereto. Plaintiff does not dispute the notice's allegation that plaintiff submitted one of his assignments to the Texas Instrument contractor to complete, in "an apparent attempt to pass someone else's work off as "his" own. Id. The notification also stated that plaintiff failed to timely complete several assignments or reworks of other assignments. Id. Even as of the time of the evaluation several months after the initial two week deadline had elapsed plaintiff had yet to turn in any of these assignments. Id. Plaintiff's explanations for his failure to perform in large part did not stem from his disability in the first place, although a disability could certainly explain some delay in the performance or reduction in professional quality, a plaintiff cannot be considered "qualified" to perform the essential elements of a job if he fails to turn in assignments altogether. Secondly, to the extent plaintiff avers he cannot perform because of his inability thumb through a manual book, there is no indication that plaintiff was prevented from performing such activity altogether. Instead, Dr. Phelps report, on which plantiff relies for this contention, merely states that plantiff should avoid continuous or repetitious activities with either hand. See Wedel dec. 21 and Exh Q. Yet the description of Plaintiff's task assignment provides that plaintiff's position requires thumbing an average of no more than one minute continuously. See Wedel decl, Exh Y at 106. Considering that Drake took plaintiff's mobility difficulties into account when setting plaintiff's deadlines, and even allowing that plaintiff may still have needed some extra time to finish projects beyond the due date, plaintiff ' s difficulties which page turning cannot explain his failure to perform.

For similar reasons, plaintiff's complaint regarding lack of secretarial help cannot justify his failure to perform. For similar reasons, plaintiff does not dispute the fact that he was provided secretarial support so that he would not have to type his reports. Wilson decl 7. Although Wilson asserts that there were certain restrictions with regard to obtaining such help, plaintiff does not provide any evidence that he had difficulty obtaining such help with regard to these projects which prevented his performance. . As a result of this negative evaluation, plaintiff was put on a 90 day performance improvement plan.(6)
Although the precise dates are unclear, it appears that in September 1993, plaintiff received a below satisfactory evaluation of his performance during this period. Wilson decl 26 and exh. 6 attached thereto. The review, which was approved by the head of the support equipment division, including comments that plaintiff "Cannot be relied upon to do his assigned job, ""Only does enough to get by," and that his work and " overall work assignments are minimally acceptable in quantity and quality. " id.

(6) plaintiff asserts this performance improvement plan was "set aside" by the human-resources office because it had not approved plaintiff's placement on a PIP. Although the court accepts, as it must at summary judgment, plaintiff's declaration as sufficient proof that the PIP was set aside, plaintiff's statement as to the reason for the set aside (i.e. because Human Resources had not approved the PIP), it is inadmissible hearsay.

No action appears to have been taken on the basis of plaintiff's original negative performance evaluation. In February 1994, the defendants put plaintiff on a formal performance improvement period ("PIP") which lasted for 120 days. App. Ex. 2 p. 15

Wilson decl 29 and Exh 7 attached thereto. The PIP included tend past assignments which were clearly outlined in the memorandum which plaintiff received. Id. During this period, the review panel provided plaintiffs assistance in completing the various assignments and then evaluated plaintiff ' s performance. At first, plaintiff received mixed reviews, including some highly satisfactory evaluations. See Wilson decl 29 and Exh 8 attached thereto.

However, as the assignments progressed, plaintiff's evaluation fell to the satisfactory or below satisfactory range from all evaluators. (7). Id and exhibit 9 att'd thereto. Plaintiff concedes that the remainder of the assignments were not performed. Id. .

Plaintiff testifies that he could not execute the bulk of the assignments because they depended upon the third assignment, which plaintiff did not complete. Id. Plaintiff offered no explanation, however, for his failure to complete the third assignment. Id. To the extent that plaintiff offers any explanation for his failure to turn in reports, Plaintiff asserts that he did not have specifications of the final task until the near the end of the PIP, and that he was hampered by the unavailability of the voice control computer and a deskomatic. Although plaintiff's disability could certainly excuse some delay in performance, it is equally true that the employee cannot be considered "Qualified" under the Rehabilitation Act when he failed to turn in any work.

(7) Apparently, Bertelt provided plaintiff a detailed memorandum as to the reasons he did not properly satisfy the PIP. See Wilson decl and Exh 11 attached thereto. However, the court could not find the memorandum, but rather only an abbreviated agenda by Bertelt which referred to the August 24, 1994 evaluation.

 AFP Ex. 2 p. 16

See Southeastern Community College vs. Davis, 442 U.S. 397, 406 (1979) (holding that an "otherwise qualified" employee must be "able to meet all of this program's requirements in spite of his handicap").(8)

Even assuming plaintiff's disability would have caused or contributed to his utter failure to perform, the court finds that plaintiff's failure did not result from defendants failure to reasonably accommodate him. Plaintiff admits that he had Secretary support during this period, which was all that his doctors had previously recommended. See Wedel decl. Exhibits D, E, M,N, and O attached thereto.

Similarly, although defendants did not provide a desk and Magic, they did use a Magic marker board to create a three by four foot work service which, although bulky, could be adjusted from an almost vertical to horizontal position. Wedel decl exh 0 at 78 (letter from Wilson to claim reviewer describing adjustable surface). The Ninth Circuit has held that "[A] n employer is not required to provide a disabled employee the most technologically advanced equipment. " Barnett vs. U.S. Air, Inc., 157 F. 3 d 744, 751 (Ninth Circuit 1998). Nor is an employer required to provide every accommodation a disabled employee may request. See Francis v Runyon, 98 F. supp 195, 206 (EDNY. 1996) (quoting Fink vs. New York City Department of Personnel, 53 F. 3 d 565, 567 (2d Cir 1995)).

(8) Although the term "otherwise qualified" refers to suits brought under 5 04, rather than 501, which requires plaintiff to be a "qualified" individual, the terms are defined the same, except that 5 01 and its regulations impose an explicit requirement that accommodation of the handicap be considered in determining a handicapped individuals qualifications for federal employment. Mantolete, 767 F2d at 1421 ("[T] here is no reason that the 5 01 definition should differ from that of 504. . . ")

App. Ex 2 p. 17

"That [the employer] could have provided a different set of reasonable accommodations or more accommodations does not establish the the accommodations provided were unreasonable or that... additional accommodations were necessary. " Id. (quoting Misek-Falkoff v IBM Corporation, 854 F Supp 215, 228 (S D NY 1994), affirmed, 60 F. 3 d 811 (2 d Circuit), cert denied, 516 U. S. 991 (internal citation omitted)).

Following plaintiff's unacceptable evaluation, the human-resources department formed a "Problem Solving Team" to develop a corrective course of action to address plaintiff's performance deficits. Wilson decl 29 and exh 12A attached thereto. The problem solving team acknowledged several of plaintiff's criticisms and noted for instance, that management should not make each task depended upon the previous task the team also suggested that management reconsider plaintiff ' s request for reassignment to a different supervisor (9) .

At the same time, the largely independent team recommended that plaintiff need to make every effort to complete tasks even if all needed data was not supplied. Id. The team of further stated that it would be available to plaintiff for consultation in performing subsequent teak assignments. Id.

(9) A K Rogers, Head of the Weapons Engineering and Logistics Department, originally considered plaintiff's request for transfer but determined that plaintiff's stated reasons did not substantiate reassignment. Based on the problem solving teams recommendation, reconsideration was given to this decision, but because there were no new reasons the provided for the change, there was no indication that Bertelt was responsible for plaintiff's performance problems, and Bertelt was only one of four independent evaluators of appellant's performance, the agency denied plaintiff's request a second time.

App. Ex. 2 p. 18

Apparently as a result of plaintiff's failure to complete the PIP satisfactorily, the Navy placed him on a third PIP plan to permit plaintiff 90 days, from October 6th, 1994 until January 3rd, 1995, to allow plaintiff to raise his performance to a minimally successful level. Wilson supp decl 30 and exh 13 attached thereto. Bertelt consulted with the problem solving team in formulating the PIP. Id at 60. The assignment involved converting four computer software programs from one computer language to another and then preparing four flow charts based on these conversions. Wilson supp decl 30, 33. The PIP also included an explicit guide regarding expectations for successful completion of the PIP. Id and exh 13 at 67-73, attached thereto. Bertelt further stated that he would discuss any changes to the task assignment the plantiff determined were necessary. Id at 61. In order to to achieve a minimally successful rating under the PIP plaintiff was required to attain an average score of two out of five total possible points. Wilson supp decl 32, and exh 13B at 81, attached thereto. 60 percent of plaintiff's score was based on the technical compliance and understanding of the report. Wilson supp decl 32 and exh 13 at 71, att'd thereto. Another 20 percent of the score considered plaintiff's timeliness.

The remaining 20% considered the "Overall quality," which presumably incorporated the professional apppearance of the reports and other organizational concerns. Id. Plaintiff's overall average was 1.5 with only 1 category, weekly status reports earning him a rating of 2.0. Wilson supp decl 32 and exh 13B at 83, attached thereto. Although the report includes certain criticisms about about the lack of professionalism in plaintiff's reports, it is clear that the majority of

App. Ex. 2 p. 17

comments, as was the heaviest weight of the scores, concern the substantive quality of plaintiff's work, a point that presumably would not be affected at all by plaintiff's disability. See generally Wilson supp decl 32-34 and exhibit 13B attached thereto. Notably, plaintiff's projects were "Generally submitted by deadlines, "an area that which would more likely be lowered if plaintiff's disability were a key factor in lowering his performance. (10). Id at 88. Instead the report focuses on several other examples of plaintiff's failure to fully address or understand the task at hand.

For instance, the report comments that plaintiff rarely offer solutions to identify problems, had difficulty working individually on projects, usually restated plan documents rather than providing original thought to a question, and President incoherent verbal presentation to his reviewers. Id. At 84-88. The report concludes in bold that plaintiff's "Failure to understand the basic engineering concepts of this task and provide workable pedicel solutions which can at least partially function, all of which are expected of a DP-to engineer, indicates that he is close bracket not able to perform this critical responsibility of [the] performance plan. " id at 87. The report further notes that plaintiff's failure means that his

(10) Notably, on the few assessments presented for the court's perusal which plaintiff asserts were his higher marks, plaintiff was awarded a three for timeliness. This was consistently either the highest or least as high as any other market given. See Wilson declaration and exhibit 14 at 91 (awarding plaintiff 2.3, 3 and 2.1 for technical compliance). Consider the plaintiff's overall average was 1.5, Plaintiff's evidence suggests that the other categories, including technical compliance which was more heavily weighted, must have been significantly lower than his timelinness scores, to bring the average down substantially. Appx Ex. 2 p. 20

"Software will have to be completely redone, resulting in additional cost to the government to rework this effort," and that plaintiff's performance indicates that he "cannot accomplish the fundamental responsibilities of his job. " Id at 89. In response to this evaluation, plaintiff offers a myriad of explanations for his deficiencies, none of which demonstrate that his disability had anything to do with his termination " Most significantly plaintiff does not attack the merits of the evaluation. That is, he presents no evidence which tend to show that his models or responses were, in fact correct and the evaluators incorrectly assessed the substantive aspects of his assignments. Instead, plaintiff first claims that his problem with one task was merely a failure to put some characters in the computer program. It would appear that the consistency of these errors reflect a lack of programming knowledge not an inability to type. See Wilson Decl 32 exh 13B at 86, attached thereto (noting proper beginning and termination of code statements are "very basic requirements of C/ATLAS language. "). Nonetheless, the plaintiff suggest this error resulted from the fact that he perform this work with the voice control computer which had insufficient memory and slow. Wilson decl at 32. This contention cannot form the basis of a reasonable accommodation claim. If plaintiff's mistakes works were truly only due to a computer program, he could have submitted dictation to secretaries. See Wilson decl 13 (admitting that by March or April of 1994, the transcription arrangement worked satisfactorily"); Wedel decl. Exh BB at 113 ("It was not until October 15th, 1993 (over a year later) that my new supervisor (B. Canon) saw to my employer providing me the tape recorder and the

Secretary with transcription machine"). Defendant is not required to provide plaintiff with the most cutting edge machinery in order to have reasonably accommodated him. See Barnett, 157 F3d at 751. The fact that defendant did "Bend [] over backwards" to accommodate plaintiff cannot be used against it if the unnecessary accommodation did not fully suit plaintiff's it needs. Terrell vs. U.S. Air, 132 F. 3 d 61, 626 (11th Circuit 1998) (quoting Vande Zande v. Wisconsin Department of Administration, 44 F. 3 d 538 (7th Cir. 1995) ("Employer that ' bends over backwards to accommodate a disabled worker. . . Must not be punished for its generosity by being deemed to have conceded the reasonableness of so far reaching an accommodation"). Thus, even assuming plaintiff's mistake was disability-related, plaintiff's failure in light of defendant's reasonable accommodation suggested he was not qualified to perform the work. Plaintiff also notes that the part of the problem was that the evaluators did not provide him feedback on his performance until the date of his proposed removal. However, this assertion is not supported by plaintiff's own exhibits. First, plaintiff engaged in extensive discussions with the Steve Stanfeld, a C/ATLAS programmer, prior to turning in his assignments. See Wilson supp decl 32 and 14A attached thereto. Indeed, plaintiff's exhibits reveal in-depth and detailed programming questions which Stanfeld provided equally detailed responses. See exhibit 15 attached to Wilson supp decl.

11 For this reason, plaintiff's statement that he turned in his book charts later because he did not receive graphic software that interfaced with the voice controlled dictation software until December 1994 does not show defendants failed to reasonably accommodate him. Moreover, as noted above, plaintiff generally turned in his assignments on time, thus, his termination was not based on his lack of timeliness.

Opp. Exh 12 p. 22

Stanfeld even provided plaintiff with his home phone number. Id at 112. Second, although both the problem solving team and Bertelt, plaintiff's supervisor, stated that plantiff could ask them questions, plaintiff does not provide any evidence that these parties were unresponsive to any feedback request he made. To the contrary, the evidence shows that Bertelt responded to plaintiff 's inquiries when Stanfeld was unavailable. Id. At 99. Notwithstanding that there is significant evidence the plaintiff was not qualified to perform his job as an engineer, plaintiff has proffered sufficient evidence to least raise a question of fact on that ground. The evaluations plantiff submitted, in regard his last evaluation, include several positive evaluations. See Wilson supp decl 29, 32 and Exh. 8,9,14, attached thereto. Most notably, with regard to the last PIP which led to plaintiff's termination, Standfeld, the C/ATLAS expert in the group, gave plaintiff marks above the minimum passing grade for his technical compliance and understanding. See Wilson supp decl, exh 14 at 91-95. Given that plaintiff has provided some evidence that the other evaluators judging him did not have sufficient training in this area,See. Wilson supp decl exh 15 at 99, Stanfeld's marks are particularly relevant in assessing plaintiff's competency.

In addition, plaintiff attributes some of his difficulties to the fact that the Navy refused his request to attend a training seminar on BASIC and C/ATLAS programming. See Wilson supp decl at 31. One evaluator stated that "Basic programming is fundamental for any degreed engineer" and was otherwise easily relearned from the "Text: tutorials, or on the job training. " See Wilson supp decl 16 at 120. However, plaintiff has provided evidence which creates a question

of fact as to whether and not this was a case. For instance, Stanfeld noted the "Relative complexity" of certain of plaintiff's programming assignments and that although some of the program involved "elementary concepts," other parts were "admittedly arcane. " Wilson supp decl Exh 14 at 92, 94. Stanfeld also noted that plaintiff's "Technical basic point. .did grow." Id at 94. Furthermore, plaintiff has asserted and defendant has not rebutted that no other engineers at the Navy base at performed conversions between these two languages. See Wilson decl at 31. Finally, as noted below with regard to plaintiff retaliation claim, plaintiff asserts that several of his evaluaters were biased against him because of his EEOC complaints and has provided some evidence to this end. These facts, if proven true could undermine the tests and evaluations of plaintiff's performance as a whole. Thus, despite defendant ' extensive evidence regarding plaintiff ' s failure to perform, some questions remain which preclude the court from finding as a matter of all that plaintiff was unqualified.

B. Defendants reasonably accommodated plaintiff

Plaintiff asserts that if his performance was deficient in any way, it was large because the defendants failed to reasonably accommodate him. As detailed above, plaintiff made several requests over a period of time from November 1991 until December 1994 for various accommodations based on recommendations from various doctors, physical therapists, an ergonomic consultants. In particular, plaintiff asserts that his failure
to perform adequately results from defendants-failure to provide certain items suggested by his physicians and consulting physical therapists

by his physicians and consulting physical therapists including the following: 1) an ergonomically correct chair,2, a wrist pad, 3) copyholder, 4) the 27 in. high office desk, 5) an adjustable work surface unit with 90 degree angle adjustability, deskomatic for similar device, 6) relief from writing requirements in greater than two-three minute intervals, 7) proper secretarial/transcription support, 8) relief from repetitive motions, particularly in the requirement for rapid turning the pages or filed materials, 9) voice-controlled dictation software with sufficient memory to support, and 10) a graphics assistant or voice control graphics software.

The court has already provided some discussion as to how defendants satisfied their burden of reasonable accommodation with regard to plaintiff's specific defenses to his performance evaluations. Nonetheless, the Court expands briefly on defendants ' accommodations, given the plaintiff has raised questions of fact about the defendants evaluations, validity. See discussion supra. "Determining whether an accommodation is reasonable depends, to a significant extent, upon determining whether the employer has acceded to the disabled employee's request. " Feliberty v. Kemper Corp., 98 F. 3 d 274, 280 (7th Circuit 1996). At the same time, a disabled a employee "cannot dictate the measure of his employer's duty to accommodate. " Matzo v Postmaster General, 685 F supp 260, 264 (D D C 1987). Although it is true that defended did not comply with all of plaintiff ' s request, the court finds that it made a good-faith effort to reach a workable, affordable solutions to plaintiff's physical App. Ex 2. p. 25

problems over a long period of time (12) See Feliberty, 98 F. 3 d at 280 ("The determination of reasonable accommodation is a cooperative process in which both the employer and employee must make reasonable efforts and exercise good faith. "). Employers are not bound to exceed to every physician-supported or individual employee request. Rather employer's primarily must gather sufficient information from the employees and from qualified experts to determine what accommodation to provide. Buckingham, 998 F. 2 d at 740. In this case, defendant satisfied this duty. Defense had three ergonomic consultations and engaged in constant communication with plaintiff's numerous doctors. Moreover, OSH conducted its own investigation into plaintiff's requests. Defendants not only investigated, they fulfilled the great majority of plaintiff's numerous requests. Specifically, over a year before plaintiff's termination, defendants have provided plaintiff and ergonomic chair; a 27 in. high computer table; a work surface which, although balky, plaintiff concedes was fully adjustable; relief from writing requirements because he had transcription support and voice control dictation software; and graphics assistant, and graphics software that interfaced with his voice control, software (although not the most efficient version).

(12) plaintiff has alleged various comments made by Wedel which suggested shedid not act in good faith. See Wilson decl at 1. Yet even assuming Wedel subjectively did not act in good faith, the court finds that objectively, the accommodations provided show that defendants acted reasonably. To the extent Wedel may have exaggerated behavior suggesting any discriminatory intent against plaintiff for making these requests, this is more properly considered part of plaintiff's retaliation claim. See supra part B.

Appx 2 p. 26

Plaintiff asserts that even if he was provided the materials, as to several requests, defendant unduly delayed in responding. The court disagrees. Reasonableness "Does not depend solely on the effectiveness of timeliness" of the accommodation. Feliberty, 98 F. 3 d at 280. Here, defendants often tried certain accommodation techniques first before determining that these methods were ineffective. But because these were reasonable alternatives, defendants acted reasonably in addressing plaintiff's complaints. See Carter, 840 F. 2 d at 67 (upholding district court's finding that employer reasonably accommodated blind plaintiff where it provided persons to act as readers, for special equipment, and decreased plaintiff's workload, and even though plaintiff criticized leaders and employer did not provide requested voice-synthesized computers and two floppy disk drives). For instance, with regard to plaintiff's complaints about the delayed computer programs, as early as June 1992, according to plaintiff, (13) defendants offered plaintiff typing services of other employees because they had no employees skilled in transcription from tapes. Following further complaints from plaintiff, defendants then provided plaintiff with a tape recorder and limited transcription services. Plaintiff still found difficulties with the transcriber defense offered. Wilson decl 13. However, even plaintiff admits by March or April of 1994, the transcription arrangement "Worked satisfactorily. " Id.
By December 1994, the defendant eliminated the need for dictation altogether by providing a voice control computer, Id. 15-17, and, ultimately, the services of a graphics assistant, Id. 18.

13 defendants assert that plaintiff was provided with secretarial support beginning in March 1992, immediately following Dr. Phelps-recommendation.

Thus, this is not a case where defendants the "did not take [plaintiff's] condition or his request seriously.] Feliberty, 98 F3d at 280. Because defendants continually tried to over a period of time to meet plaintiiffs request, the court finds they acted reasonably.

Similarly, defendants did not unreasonably handle plaintiff's request for an ergonomic chair. Although the chair was not actually provided until sometime between February and April 1992, Wedel testifies, and plaintiff does not rebut, the fact that the chair was ordered soon after plaintiff's original request. However, for unknown reasons this request was lost and the item had to be reordered. This delay, there for, cannot be used to show the defendant failed to accommodate plaintiff.

Defendant ' accommodations seem particularly reasonable in light of the fact that defendants provided plaintiff with light duty employment for a period of four years, when the law does not require them to create a light duty position where one does not otherwise exist. See, e.g.,Terrell, 132 F. 3 d at 626 (holding defendant not required to create a part-time position where one does not exist); Howell v Michelin Tire Corp., 860 F supp 148, 1492 (MD Ala 1994). Moreover, defendants granted plaintiff's repeated requests for medical leave Wilson sep stmt 7, 12.

Finally, any delay is immaterial in this instance because, as opposed to the case cited by plaintiff in which delay was grounds for finding reasonable accommodation may not have been satisfied, the evidence shows that plaintiff's condition actually improved, rather than deteriorated, over time (14).

14 See Wedel decl, exhibit Q at 83 (letter from Dr. Phelps to T R Dahlstrom, Office of Workers' Compensation Programs

In contrast, there was no dispute that the condition of the plaintiff medical doctor suffering from carpal tunnel syndrome and Feliberty, on which plaintiff relies, grew worse because of the delay in attending to his needs. , Feliberty 98 F.3d at 279. The deterioration forced that plaintiff to undergo surgery to which was unsuccessful and, ultimately, prevent plantiff from working altogether. Id at 279. In some, the court finds that although plaintiff has a least raise questions of fact as to whether he was qualified for his position, Defendants have satisfied their burden to reasonably accommodate him. Accordingly, to extend plaintiff's Rehabilitation Act claim depends on a failure to accommodate or disability discrimination claim, the Court dismisses these claims with prejudice.

C. Retaliation claim

14(cont'd)dated March 27th, 1992) (reporting "[plaintiff's] condition has improved very slightly since the time of the last evaluation, primarily on the basis of control of activity. His symptoms are those of more mild carpal tunnel syndrome on the left side and there has been objective improvement in his grip and pinch determinations bilaterally. "); Wedel declaration, exhibit LL (letter from Dr. Patrick Kong to Bertelt dated April 25, 1994) (finding EMG and NCV studies reveal "No definite evidence of active media neuropathy suggesting an active carpal tunnel syndrome on a neurophysiological test " concluding that "patient's symptoms of carpal tunnel syndrome may have improved significantly with the resting or treatment in the past one or two years to the point that now the test results have become normal. An interesting way, reviewing the medical records, most of the record suggests that patient did not have any Tinel's sign prevail and Phalen's sign of any definite muscle wasting in the past suggesting a severe carpal tunnel syndrome. "); Wedel declaration, Exh NN at 178 (letter from Dr. Phelps to Wedel dated July 5, 1994 (reviewing Dr. Kong's analysis and agreeing that Mr. Wilson's condition has improved and that the condition of patient's subjective symptoms were of greater magnitude than one would expect with the degree of objective findings"). App. Ex. 2 p. 29

1. Legal standard for Retaliation Claim under the Rehabilitation Act

In addition to his reasonable accommodation claim, plaintiff also asserts that defendants unlawfully retaliated against him because he made accommodation requests and because he filed several complaints between January 1994 and April 1995 against his employers at the EEOC. See Wilson supp decl 16-22. The court finds the plan to satisfy his burden in this regard. The Rehabilitation Act prohibits retaliation against federal employees. See 29 U.S.C. 794 A (a) (1); Smith v United States Postal Service 742 F.2d 257, 259 (6th Cir 1984). The anti-retaliation provision of the act provides in pertinent part: "No person shall discriminate against an individual because such individuals has opposed any act or practice made unlawful by this Act. " 29 USC 794 (a). An aggrieved federal employee is entitled to the remedies, procedures, and right set forth in title 7 of the Civil Rights Act of 1964, 42 U.S.C. 2000e, at 6, as amended. Id.
To state a prima facie case of retaliation, a plaintiff must show that 1) he engaged in a protected activity; 2) he suffered an adverse employment action, and 3) there is a causal link between the protected activity and the adverse action. See Barnett, 157 F.3d at 753-54 (ADA case); Yartzoff vs. Thomas, 809 F.2d 1371, 1375 (9th Cir 1987) (Title VII case). If a plaintiff meets this burden, a defendant carries the burden of production to articulate a legitimate, non retaliatory reason for terminating him. See Yartzoff, 809 F.2d at 1376. Once a defendant satisfactorily articulates such a reason, the legal mandatory inference of retaliation discrimination arising from the plaintiff's prima facie case is set aside. See Texas Department of

Community Affairs v Burdine, 450 U.S. 248, 255 and n. 10 (1981).

At this point, a plaintiff's claim may still go forward if the plaintiff shows that the alleged explanation serves merely as a pretext for impermissible retaliation. Id at 256.

2. Analysis

A. Plantiff has established a prima facie case of retaliation

The only issue defendants raise against plaintiff ' s prima facie case is whether he can satisfy the causation prong of the analysis. The 9th Circuit has held the causation maybe inferred based on an employer's knowledge that plaintiff engaged in a protected activity in the proximity in time between the protective action in the alleged retaliatory employment decision. Yartzoff, 809 F. 2 d at 1376. Defendants aver that there is no causation because plaintiff's first complaint with the EEOC (January 1994) preceded his termination (April 1995) by over year. Defendant ' argument ignores the fact that plaintiff was subject to formal review for an extended period which led to his ultimate termination, beginning as early as 1992. Moreover plaintiff's protected activity was not limited to his EEOC filings, but also included his requests for accommodation. See Barnett, 157 F.3d at 754. Defendants have presented no proof to counter plaintiff's assertion that defendants new plaintiff had filed EEOC complaint against his employer and supervisors. See Wilson supp Decl 32. Moreover, plaintiff's employer's were obviously aware of his accommodation requests, which began as early as 1991. Because the defendant's knew about plaintiff's protected activities and that these

Opp. Ex. 2 p. 31

occurred relatively simultaneously with various adverse actions taken against plaintiff, the court finds the plaintiff has established a prima facie case of retaliation.

B. Defendents have articulated nonretaliatory reasons for its adverse employment decisions

For the reasons listed above which call to question plaintiff's qualifications for his position, the court finds that defendants have satisfied their burden of articulating nonretaliatory reasons for terminating plaintiff.

C. Plaintiff has raised questions of fact that defendants proffered explanations are pretextual

The Ninth Circuit recently clarified the evidence necessary for plaintiff to rebut defendent's showing as pretextual. "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. " Godwin vs. Hunt Wesson Inc., 150 F.3d 1217, 1221 (9th Cir 1998). In these cases, the court requires " very little" direct evidence to support a pretext argument. Id. The Ninth Circuit has further observed that a grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in title VII cases in which the plaintiff has established a prima facie case because of the "elusive factual question" of intentional discrimination. Yartzoff 809 F. 2 d at 1377 (internal quotations and citations omitted). The court finds that plaintiff has testified his burden in this regard. Plaintiff lists a number of statements which were directed against him beginning as early as December 1991 and continuing until at least

January 1995. Many of these statements revealed no
discriminatory animus against plaintiff for exercise his right to file with the EEOC or for requesting reasonable accommodation. See, example, Godwin, 150 F.3d at 221 (holding "stray remark" which is "uttered in an ambivalent manner and [is] not tied directly to [the plaintiff]'s termination" is insufficient to show pretext); Hixon vs. County of Alameda Sheriff's Dept.No. C 97-0589 SI, 1999 W. El 305513, at * 12 (ND Cal. May 12, 1999) (comments showing strained relationship without evidence of discriminatory intent cannot be used to show a pretext). Additionally, several of the statements on which plaintiff relies were not said by plaintiff's supervisors, but, rather his co-workers. See Mattern v Eastman Kodak Co., 104 F.3d 702, 707-08 (1997) (hostility expressed by fellow employees, unless shown to be caused by employer, could not be attributed to employer were no proof acts were condoned or directed by employer for purposes of establishing liability under title VII). Yet plaintiff has listed several statements which could certainly qualify as demonstrating animus toward plantiff because of his protected activities. Plaintiff testifies, for instance, that a supervisors may fun of plaintiff in January 1992 for wearing wrist splints. See Wilson supp decl 2. Plaintiff also describes an incident on June 30, 1992 when weeks another supervisor, called plaintiff's medical restrictions "pseudo restrictions" and expressed skepticism when plaintiff explained his doctors restriction on thumbing through pages of filed materials. Notice of errata re Wilson supp decl at 2. Plaintiff also described an incident on June 30th, 1992, in which Drake came into his office to request information as to a recommendation which had been

given by one of his doctors. When plaintiff indicated that he did not wish to have a conversation with Drake about this topic without recording it, Drake blocked plaintiff's exit.

In addition, plaintiff asserts that several of Wedel's comments and conduct indicates that she bore animus against plaintiff for making accommodation requests. For example, plaintiff asserts that Wedel refused to obtain clarification from Phelps regarding his recommendation for dictation accommodations and consistently acted rudely toward plaintiff when he made his request. Wilson supp decl 3. Wedel also told plaintiff that she would not come up to his office and measure a whole bunch of tables just to make sure that defendants complied with plaintiff's Dr.'s recommendations. Wilson supp decl 1. (15). In addition, the evidence suggests that plaintiff's negative performance reviews closely followed on his repeated requests for accommodation. See Yartzoff, 809 F.2d at 1377 (employer's close watching or surveillance raises questions about pretext). As with the plaintiff in Yartzoff, plaintiff was subjected to not just one, but a series of adverse employment decisions over a period of several years. . . Plaintiff's negative reports and continuous evaluation begins soon after he began requesting accommodations and became more intense as he began filing the EEOC reports.

15 Although many of the alleged statements were made well before plaintiff's EEOC requests, they are still relevant for two reasons. First, these comments generally followed or made contemporaneously with plaintiff's request for accommodation. Second, the relevant time period for the causation prong of the prima facie case concerns the time between protected conduct and the adverse action. Discriminatory comments, however, are relevant even if long before the adverse action because they go to establish motive, and unreliability of defendants ' professed reasons for taking an adverse employment action.

These negative evaluations followed a period from 1988-1991, just before plaintiff began making accommodation requests, during which time plaintiff received three performance reviews rating him as fully successful, and in some cases above fully successful. See Wilson supp decl 23 and exh 1-3 attached thereto; See Yartzoff 809 F.2d at 1377 (evidence that plaintiff had received positive performance ratings for years prior to his complaints, and, just after receiving a sub average rating provided evidence of pretext). It is probative of pretext and thus of the "elusive factual question" of intentional discrimination on the individual counts. Thus, summary judgment on retaliation claim is inappropriate at this time.

3. Plaintiff cannot show that the nondiscrimination determinations of the M S P B were erroneous

Plaintiff's second cause of action requests the court to review the determinations made by the MSPB. The court reviews the MSPB's determination of the nondiscrimination claims under a differential standard. See by the U.S.C. 7703 (c). The discrimination claims are subject to trial de novo. Id. ; Sloan v West, 140 F. 3 d 1255, 1260 (9th Circuit 1998). For the reasons stated above, to the extent the MSPB determined that plaintiff was reasonably accommodated, and was not discharged on the basis of his disability, the court affirms its decision. However, to the extent the MSPB found that plantiff was not retaliated against because of his accommodation requests and EEOC complaints, the court finds questions of fact which preclude it from adjudicating these issues at the summary judgment stage. 16.

16 notwithstanding the court's conclusion, the court finds it

III. Conclusion

For all the reasons set forth above, the court hereby orders that dependent's motion for summary judgment is granted to the extent plaintiff's causes of action for violation of the Rehabilitation Act and for review of the M S P B decision depends upon a finding of reasonable accommodation, but denied to the extent these claims are based on retaliation. So ordered.

Dated June 28th, 1999

Audrey B. Collins

United States District Judge

16(cont'd) appropriate to note, as the 9th Circuit did in Yartzoff, that its ruling "should not emboldened [plaintiff] in his hopes of ultimately succeeding at trial. In the face of strong evidence presented by [defendants] showing a legitimate reasons for [their] actions, [plaintiff's] evidence appears weak" Yartzoff, 809 F.2d at 1377-78.

United States District Court
Central District of California

Civil minutes-General

Case No: CV 98-2474 ABC (CTx) date: July 26,1999

Title: Wilson v Dalton

Docket entry

Present: Hon. Audrey B. Collins,United States District Judge
Debra O'Neill, Deputy Clerk
Not Present-Court Reporter
Attorney present for plaintiff: none
Attorney present for defendants:none
Proceedings: Defendants Motion in Limine to Exclude Evidence and Argument of Alleged Discriminatory and Retaliatory Acts Not Raised Until the Eve of Trial
(in chambers)

The court has expended significant judicial resources in conducting paragraph-by paragraph comparisons between plaintiff and defendant's papers to determine whether plaintiff's factual contentions were 1, (not disclosed or raise until the eve of trial or 2) dismissed pursuant to the court's June 29, 1999 grant of partial summary judgment to defendant on the ground of reasonable accommodation. In addition, the court considered whether the various contentions were relevant to plaintiff's remaining claims as outlined in the court's prior minute order of July 21, 1999. Based on these considerations, the court has excluded entirely or edited certain contentions.

1. The court has determined following contentions should be excluded in their entirety because they contain allegations that were not race until the eve of trial:32, 45, 51, 58, 74,(1), 83, 84, and 85.

2. The Court has edited the following contentions because they contain allegations that were not raised until the eve of trial:
A. 38 shall read as follows:
"Shortly after January 27, 1992, plaintiff rejected a light duty job offer on the basis that the Navy had failed to provide a flex arm workstation. "
B. 59 shall read as follows:
"As an act of physical disabilities discrimination the harassment of plaintiff for making reasonable accommodation requests, plaintiff's first level supervisor, Sam Drake, gave plantiff a 1 day notice late on August 26, 1992, to attend an early morning meeting on August 28, 1992, with Gerry Weeks, San Drake, and plaintiff. Plaintiff was requested to find an "unbiased witness" of his choice. "
C. 67 shall read as follows:
"As an act of physical disabilities discrimination and harassment and retaliation against plaintiff for making reasonable accommodation requests and EEO filings, Sam Drake requested numerous meetings with plaintiff, sometimes the meetings occurred as much as three times per day. The documented meetings with witnesses (Lisa Stuckey and (1 time) Mike Lastrico) occurred from approximately April 1993 until September 1993. "

1. Plaintiff may not assert this claim with regard to his conversation with Sam Drake about the transfer issue because it was not raised until the eve of trial. Plaintiff may, however,testify that he wanted to transfer, a claim that he has previously raised.

App. Ex. 3 p. 2

D. 69 shall read as follows:(2)
"As an act of physical disabilities discrimination and harassment and retaliation against plaintiff for making reasonable accommodation requests and EEO filings, on April 21, 1993, Plaintiff's's supervisor, Sam Drake told plaintiff that, "Work performance was unsatisfactory, another PIP would start in few weeks. "

e. 132 show read as follows:
"As an act of harassment and retaliation plaintiff filing a grievance against them, in mid-1992, Arlene Black and Mary Wedel advised Sam Drake not to pursue the fitness for duty exam that had been approved by the command up to and including Lyle Hochburger. Plaintiff had no knowledge of Mary and Arlene's recommendation to Sam Drake or the fitness for duty until 1994.

3. The court has determined the following contention's should be excluded in their entirety because they were because they contain allegations that were dismissed pursuant to the court's June 29, 1999, grant of partial summary judgment on the issue of reasonable accommodation:(3) 31, 47, 53, 54, 55, 56, 56,65, 71, 75, 77, 105, 109, 110, 111, 115, 116, 117, 118, 121

2. The court also strikes of this paragraph because these allegations were dismissed pursuant to the court's June 29, 1999 grant of partial summary judgment

3 the court's minute order of July 21, 1999, explained the distinction between the types of reasonable accommodation-related facts which a necessary to plaintiff's remaining claim for retaliatory discharge, and those which merely seek to reargue the court's prior holding that the Navy made reasonably accommodated plaintiff's disability to the guise of discrimination or harassment. App. Ex. 3 p-3

4. The court has edited the following contentions because they contain allegations that were dismissed pursuant to the court's June 29, 1999, grant of partial summary judgment on the issue of reasonable accommodation:
a. 35 shall read as follows:
"Shortly thereafter, when plaintiff was provided with a three by four foot magic marker board, as a reasonable accommodation to plaintiff's request for a deskomatic device, Sam Drake, his supervisor, harassed plaintiff on account of his disability and request for reason accommodations, by pointing to the Magic marker board and saying sardonically, "There's your workstation device. " On another occasion, in order to harass plaintiff, Bob Stall, an engineer who worked in plaintiff's division, came up to plaintiff and said with respect to plaintiff"s wrist splints, "Gee, is that all you need to show that you have an injury?""

b. 37 shall read as follows:
"In January of 1992 plaintiff made complaints that defendant was not accommodating his disability. "

c. 40 shall read as follows:
"As an act of retaliation against plaintiff for making reasonable accommodation requests, Sam Drake told plaintiff that if the Dictaphone was procured, that plaintiff "Would not know how to use it anyway.) "".

3 (cont'd) Thus, plaintiff may, for instance, provide testimony that a particular doctor made a recommendation on a certain date. See example 98 However, he may not characterize the Navy's conduct in providing certain accommodations as unreasonable by, for instance, asserting that the government delayed in providing a certain accommodation or retaliated against him by wrongfully denying him a particular accommodation. See example 105. App. Ex. 3 p. 4

G(cont'd)The secretary for Wil's branch, Laurie Pace, transcribed plaintiff's report the next day within a few hours. Even though plaintiff turned in the report after Laurie completed the transcription, plaintiff was rated unsatisfactory by Wil and Gerry because it was turned in one day after the scheduled date. As an act of harassment and retaliation for filing the EEO complaint on May 17, 1994, Wil Bertelt conducted a 2 1/2 hour meeting with plaintiff. Plaintiff's supervisor, Wil Bertelt, requested plaintiff turn the tape recorder on and off approximately eight times during their discussions regarding Plaintiff's's work. "

5. The court has determined that certain contentions should be excluded in their entirety because they are irrelevant to play the's remaining claims for the reasons discussed in the court's prior minute order of July 21, 1999. The court also found some of these statements to be outside the scope of the litigation, non-actionable stray comments, or otherwise not in the furtherance of any issue relevant to this case. 41, 72, 82, 90, 92, 101, 103, 134, and at 135.

The court has arrived at these determinations based on its review of plaintiff's submissions and declarations with regard to the motion for partial summary judgment as well as a briefing with regard to this motion. Frequently, the court discovered that despite plaintiff's assertion that a specific fact was discussed in plaintiff's's deposition at a certain page, the court cannot find it at the page plaintiff cited. The considerable time expended by the court on this matter makes reconsideration of the court's rulings highly unlikely. However, the court will hear oral argument on this issue at the pre trial conference on August 2nd, 1999. App Ex. 3 p.5

General statements of that a certain factual allegation appeared among the 14, 000 pages of discovery are insufficient to constitute sufficient prior notice of the claim.

Copies to: Judge Collins
Counsel of record
Deputy clerk S/J. S N
I hereby certify that this document was served by fax delivery on plaintiff/defendant (or parties) at their respective most recent fax number of record in this action on this date.
Date 7-27-99
Debra O'neill deputy clerk

App. Bk 3 p.6

Not For Publication
Filed April 26, 2002

United States Court of Appeals
For the Ninth Circuit

Cathy A. Catterson
Clerk, U.S. Court of Appeals

Robert C. Wilson,
Plaintiff-Appellant
v.
John Dalton, Secretary of Navy; United States Navy,
Defendants-Appellees.

No. 00-55281
D C No. CP-98-2474-ABC

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Before: B Fletcher,TG Nelson, &Berzon,Cir.Judges

The panel has voted to deny Appellant's petition for rehearing. Judge TG Nelson and Judge Berzon vote to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc.Fed R.App.P.355.

The petition for rehearing and the petitionn for rehearing en banc are denied.

App. Ex. 4